

Chapter 895: UNDERGROUND FACILITY DAMAGE PREVENTION REQUIREMENTS

SUMMARY – This rule describes the responsibilities of excavators, underground facility operators, the damage prevention system (Dig Safe System, Inc.), and the Public Utilities Commission in implementing Maine's underground facility damage prevention statute. The rule establishes notification, marking, and reporting procedures, defines violations and penalties, and describes the process by which the Public Utilities Commission will enforce the program and monitor its success.

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§ 1 GENERAL PROVISIONS

- A. Purpose and Scope. The purpose of this rule is to implement the provisions of the State's underground facility damage prevention requirements contained in Title 23 M.R.S.A. § 3360-A, "Protection of Underground Facilities." The rule establishes the responsibilities of excavators, operators and Dig Safe System, Inc. The rule also establishes the process by which the Public Utilities Commission enforces this program.
- B. Applicability. Dig Safe System, Inc. shall be the damage prevention system that operates in Maine. Unless otherwise indicated, the provisions of this rule apply to all operators of underground facilities, excavators, architects and other designers of excavations, and Dig Safe System, Inc.

§ 2 DEFINITIONS

As used in this section, unless the context otherwise indicates, the following terms shall have the following meanings.

- A. Business Day. "Business day" means a 24-hour day other than Saturday, Sunday or a legal Maine holiday.
- B. Borrow Pit. "Borrow pit" has the same meaning as provided in Title 38, Section 482, Subsection 1-A, as it may change from time to time.
- C. Commercial Timber Harvesting Activity. "Commercial timber harvesting activity" means the cutting or removal of timber for the primary purpose of selling or processing forest products and includes the attendant operation of mobile or portable chipping mills and of cutting and skidding machinery and the creation, use and maintenance of skid trails, skid roads, winter haul roads and other roads to facilitate timber harvesting.
- D. Commission. "Commission" means the Maine Public Utilities Commission.
- E. Damage. "Damage" means any impact upon, or removal of support from, an underground facility as a result of excavation or demolition, which according to the operating practices of the operator would necessitate the repair of such facility.
- F. Damage Prevention System or System. "Damage prevention system" or "system" means an organization whose membership is open to all operators of underground facilities located within the State of Maine, which maintains a database, provided by its member operators, that includes the geographic areas in which its member operators desire transmission of notices of proposed excavation and which has the capability to transmit notices of

proposed excavation to member operators by teletype, facsimile, computer or telephone.

- G. Demolition. "Demolition" means any operation by which a structure or material is wrecked, razed, rendered, moved or removed by means of any tools, equipment or discharge of explosives which could damage underground facilities.
- H. Dig Safe System, Inc. or Dig Safe. "Dig Safe System, Inc." or "Dig Safe" means the damage prevention system operating in Maine.

H-1. Drinking Water Well Construction. "Drinking water well construction" means excavation associated with construction of a drinking water well, such as well drilling or trenching for installation of pipes and equipment associated with the drinking water well.

- I. Emergency. "Emergency" means a sudden or unexpected occurrence involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property or essential public services.
- J. Emergency Excavation. "Emergency excavation" means immediate excavation necessary to prevent injury, death or loss of an existing vital service.
- K. Excavation. "Excavation" means any operation in which earth, rock or other material below the ground is moved or otherwise displaced, by means of power tools, power equipment or explosives and includes grading, trenching, digging, ditching, drilling, auguring, tunneling, scraping and cable or pipe driving, except tilling of soil and gardening or displacement of earth, rock or other material for agricultural purposes, and except installation and maintenance of signs performed by the Department of Transportation.
- L. Excavator. "Excavator" means any person proposing to make, making or contracting for an excavation.
- M. Mechanical Means of Excavation. "Mechanical means of excavation" means excavation using any device or tool powered by an engine except air vacuum methods of excavation.
- N. Member Operator. "Member operator" means an operator that is a member of Dig Safe, Inc.
- O. Notify, Notice or Notification. "Notice" or "notification" means the delivery of all required information to the person to be notified and the receipt of it by

such person in accordance with this rule. To “notify” means to give notice in accordance with the requirements of this rule.

- P. Non-member Operator. “Non-member operator” means an operator that is not a member of Dig Safe, Inc.
- Q. Operator. “Operator” means the owner or operator of an underground facility. Within this rule, operators are further categorized as “member operators” and “non-member operators.”
- R. Person. “Person” means an individual, partnership, municipality, state, county, political subdivision, public utility, joint venture or corporation and includes the employer of an individual.
- S. Respondent. “Respondent” means a person alleged to have committed a violation under this rule or 23 M.R.S.A. § 3360-A.
- T. Underground Facility or Facility. “Underground facility” or “facility” means any item of personal property buried or placed below ground for use in connection with the storage or conveyance of water, sewage, electronic, telephonic or telegraphic communications, cable television service, electric energy, oil, gas or other substances and including, but not limited to, pipes, sewers, conduits, cables, valves, lines, wires, manholes, attachments, appurtenances thereto and those parts of poles below ground. This definition shall not include highway drainage culverts or underdrains.
- U. Underground Facility Operator. “Underground facility operator” means the owner or operator of any underground facility, other than an underground oil storage facility as defined in Title 38, section 562-A, subsection 21 or an airport aviation fuel hydrant piping system, used in furnishing electric, telephone, telegraph, gas, petroleum transportation or cable television service. “Underground facility operator” does not include a municipality or a public utility with fewer than five full-time employees or fewer than 300 customers.
- V. Violation. “Violation” means any of the actions identified in 23 M.R.S.A. § 3360-A, section 6-C (the Dig Safe law) as violations subject to the imposition of an administrative penalty and acts of non-compliance with the provisions of

§ 3 RESPONSIBILITIES OF THE DESIGNER

Architects, engineers, or other persons designing or requiring excavation shall obtain from the operators, recorded information describing the nature and location of all affected underground facilities, and shall make the information a part of the plan by which excavation occurs.

§ 4 RESPONSIBILITIES OF THE EXCAVATOR

A. Pre-marking. The excavator shall mark the approximate boundary of a proposed excavation in white, or as otherwise established by Dig Safe, prior to notifying Dig Safe as required by Section 4(B).

B. Notification

1. Notification to Dig Safe

a. Notice process. An excavator shall notify Dig Safe of the location of the intended excavation at least 72 hours, not including Saturdays, Sundays and legal Maine holidays, but not more than 30 calendar days, prior to the commencement of excavation. Notification may be given in writing, by telephone, or by electronic means. Non-emergency notification shall take place between the hours of 7 a.m. and 5 p.m.

i. No facilities. If an excavator notifies the Dig Safe System and nonmember operators as required by this Section, and is informed by the Dig Safe System and each nonmember operator, including private landowners, that no underground facilities exist in the proposed excavation area, then the excavator is not required to wait the 3 days as required by this Section and may begin excavation immediately.

ii. PUC reference database. An excavator planning drinking water well construction may use the Commission's reference database within 30 days of the date excavation begins to determine whether any member operators have underground facilities in the municipality in which the excavation area is located. If the Commission's reference database indicates that there are no member facilities located in the municipality in which excavation is planned, the excavator is not required to notify the Dig Safe System of the planned excavation. The excavator must notify all non-member operators that are listed on the Commission's reference database as having underground facilities in the municipality in which the excavation area is located as required in Subsection 4(B)(2).

- b. Acknowledgement. An excavator shall acquire and record an acknowledgement from Dig Safe for any notice the excavator sends by electronic means.
 - c. Blasting. If an excavation involves blasting, the excavator shall notify Dig Safe in writing of the date and location of the blasting. This written notice must be given and received at least 24 hours in advance of the blasting, except that, in the case of an unanticipated obstruction requiring blasting, the excavator shall provide written notice not less than four hours in advance of that blasting.
 - d. Renotification. If the proposed excavation or blasting does not commence within 30 calendar days of notification or the excavation or blasting will be expanded outside the location originally specified in the notification, the excavator shall renotify Dig Safe as specified in this section.
 - e. Contents of notice. Notification to Dig Safe shall contain the following information:
 - 1) the name of the individual serving such notice;
 - 2) the location of the proposed excavation;
 - 3) the name, address, telephone number and the telefacsimile (fax) number, if available, of the excavator;
 - 4) the excavator's field telephone number, if available; and
 - 5) the type and extent of the proposed excavation.
 - 2. Additional notifications. In addition to notifying Dig Safe as required in Subsection 4(B)(1), an excavator shall notify any non-member operator in the area of the proposed excavation. This notice must be in accordance with subsection 4(B)(1) except that it will be provided directly to the non-member operator and not to Dig Safe.
- C. Excavation
- 1. Emergency excavations. In an emergency, an excavator may commence an excavation after taking all reasonable steps, consistent with the emergency, to pre-mark the excavation site and notify Dig Safe and non-member operators pursuant to subsection 4(B).

2. Safety zone. An excavator may not use mechanical means of excavation when excavating within 18 inches in any direction of any marked underground facilities until the underground facilities have been exposed, except that mechanical means may be used, as necessary, for initial penetration and removal of pavement, rock or other materials requiring use of mechanical means of excavation. Once the underground facilities have been exposed, further excavation must be performed employing reasonable precautions to avoid damage to the underground facilities, including, but not limited to, any substantial weakening of structural or lateral support of the facilities or penetration or destruction of the facilities or their protective coatings. The lateral boundaries of the safety zone shall be the operator's tolerance zone markings as directed in subsection 6(B)(4)(b).
3. Maintenance of markings. An excavator shall maintain markings made by an operator pursuant to Section 6(B). If an excavator cannot maintain the markings, the excavator shall request that the operator reapply the markings.

D. Reporting

1. Notice of damage to operator. An excavator who damages an underground facility shall immediately notify the affected operator. The excavator shall not backfill an excavation where damage has occurred without first receiving permission from the affected operator.
2. Report to Commission. An excavator involved in an excavation shall report to the Commission any violations of this rule that the excavator observes during an excavation, and that:
 - a. pose a clear threat to an underground facility; or
 - b. result in damage to an underground facility.

The violation shall be reported on the Underground Facility Incident Report available from the Commission (207-287-3831 or <http://www.state.me.us/mpuc>). The excavator shall submit this report within 10 days of discovering a suspected violation. Any person may report to the Commission any other failure to comply with this rule or other concerns regarding underground facilities damage prevention, using the Underground Facility Incident Report.

E. Legal Effect of Non-compliance.

1. Excavator. The failure of an excavator to provide any or all notices required by Sections 4(B)(1) and 4(B)(2) for an excavation that results in damage to an underground facility or facilities shall be prima facie evidence in any civil or administrative proceeding that the damage was caused by the negligence of the excavator.
2. Member Operator. If an excavator complies with all excavator responsibilities described in Sections 4(A) and 4(B)(1), and if Dig Safe does not provide all information pursuant to Section 5(A) or an operator does not provide all information pursuant to Section 6(B) or the information provided fails to identify the location of the underground facilities in accordance with Section 6(B), then an excavator is not liable for any damage or injury caused by the excavation, except on proof of negligence.
3. Non-member Operator. If an excavator provides notice to non-member operators pursuant to Section 4(B)(2), and if a non-member operator fails to mark the location of its facilities pursuant to Section 6(B), then an excavator is not liable for any damage or injury caused by the excavation, except on proof of negligence.

F. Exemption; Commercial Forestry and Borrow Pit Operations

1. Activity requiring no written agreement. An excavator is exempt from the notice requirements of Section 4(A) and 4(B) for any excavation undertaken in conjunction with a commercial timber harvesting activity or borrow pit operation provided the excavation:
 - a. is not conducted in a public place, on public land or within a public easement, including, but not limited to, a public way;
 - b. is not conducted within 100 feet of an easement or land owned by an underground facility operator;
 - c. is not conducted within 100 feet of an underground facility; and
 - d. does not involve the use of explosives.
2. Activity requiring written agreement. An excavator is exempt from the requirements of Sections 4(A), 4(B) and 4(C) for any excavation undertaken in conjunction with a commercial timber harvesting activity, when that excavation is within 100 feet of an underground facility or on an easement or land owned by an operator or within 100 feet of an easement or land owned by an operator if the excavator:

- a. contacts Dig Safe to identify all member operators within the area of the excavation;
- b. enters into written agreements with all operators within the area of the excavation and with all persons owning the land on which the excavation occurs; and
- c. undertakes the excavation in accordance with the terms of the written agreements.

§ 5 RESPONSIBILITIES OF DIG SAFE

- A. Notification. Upon receiving notice of excavation as required by Section 4(B), Dig Safe shall immediately notify all member operators whose underground facilities may be affected by the notice.
- B. System Requirements
 1. Dig Safe shall provide a single, statewide, toll-free telephone number. All telephone directories shall prominently display the toll-free number: 1-(888)-DIGSAFE (1-(888)-344-7233) or such other number that may be established.
 2. At a minimum, Dig Safe shall staff its operation from 7 a.m. to 5 p.m. each day excluding Saturdays, Sundays and legal Maine holidays. Dig Safe shall provide emergency notification 24 hours per day, 7 days per week.
 3. Dig Safe shall provide adequate communication equipment and personnel sufficient to answer calls within 20 seconds under normal operating conditions or otherwise as soon as practicable.
 4. Dig Safe shall transmit non-emergency messages to member operators by 6:00 p.m. on the date of receipt. Dig Safe shall transmit emergency messages to member operators within 10 minutes of receipt under normal operating conditions or otherwise as soon as practicable.
 5. Dig Safe may adopt rules requiring face-to-face meetings between excavators and member operators.
 6. The cost of operating Dig Safe shall be apportioned equitably among its member operators.

7. Dig Safe shall maintain adequate records to document compliance with the requirements of this rule. Dig Safe shall annually report to the Commission information adequate to demonstrate the extent to which it answers calls and transmits messages within the time frames required by this rule.
8. The Dig Safe System shall assist the Commission to the extent practicable in coordinating access for Maine excavators calling the Dig Safe System to the Commission's reference database.
9. The Dig Safe System shall restrict the use of facility location information provided by operators to those uses required to perform its duties under this Rule and will use reasonable care to maintain such information in a secure manner.

C. Public Awareness Programs

1. Dig Safe shall provide all member operators with a brochure explaining Dig Safe's objectives, procedural guidelines and opportunities for member participation.
2. Upon request, Dig Safe shall provide training to operators and excavators regarding its operations.
3. Dig Safe shall conduct a public awareness program, including but not limited to making literature available describing Dig Safe, distributing such literature to the public, and making such literature available for purchase and distribution to requesting parties.

§ 6 RESPONSIBILITIES OF THE OPERATOR

A. Dig Safe Membership

1. Members
 - a. An underground facility operator, as defined in Section 2(U), must join Dig Safe. Any other operator may voluntarily join Dig Safe.
 - b. All members of Dig Safe shall pay to Dig Safe the cost of operation apportioned to the members pursuant to subsection 5(B)(6).

- c. All members of Dig Safe shall maintain communications equipment that is compatible with Dig Safe's communication equipment maintained pursuant to subsection 5(B)(3).

d. Each Dig Safe System member shall provide the location of its underground facilities as well as any underground facilities that it is obligated to mark pursuant to Section 6(B), to the Dig Safe System either by Global Positioning System (GPS) coordinates if the facility is not located within 100 feet of a street or road or, if the facility is within 100 feet of a street or road, by association with the street or road, and in a manner consistent with Dig Safe System methodology. The operator shall provide this information to the Dig Safe System to rely on for notification purposes and, unless otherwise specified by this Rule, shall provide the information in a format that the Dig Safe System is capable of using, such as electronic or digital format, GPS coordinates, or by drawing the specific location of any underground facilities on maps provided by the Dig Safe System.

- 2. Non-members. An operator that is not a member of Dig Safe pursuant to subsection 6(A)(1) shall, upon receipt of the notice provided for in subsection 4(B)(2), mark the location of its underground facilities in accordance with subsection 6(B).

B. Marking

- 1. Purpose. An operator shall, upon receipt of the notice provided in Section 4(B)(2) or Section 5, advise the excavator of the location and size of the operator's underground facilities within the area of the proposed excavation by marking the location of the facilities in accordance with this subsection.
- 2. Time requirements
 - a. Initial marking. The operator shall complete marking no later than two business days after receipt of the notice provided for in Section 5 or Section 4(B)(2), unless the proposed excavation is of such length or size that the operator cannot reasonably mark all its underground facilities within two business days. In such an instance, the operator shall inform the excavator, and the excavator shall notify the operator of the location in which excavation will first be made. The operator shall mark the underground facilities in that location within two

business days and will mark the remaining facilities as soon as practicable.

- b. Re-marking. Following an excavator's request to re-mark an excavation area pursuant to subsection 4(C)(3), an operator shall again mark this location within one business day.
- c. Emergencies. An operator shall mark its underground facilities as soon as practicable after receiving notification of an emergency excavation pursuant to Section 4(C)(1).
- d. Test holes. After receiving notification pursuant to Section 5 or Section 4(B)(2), if an operator must dig test holes in order to locate its underground facilities, other operators within the premarked area shall mark their facilities within one business day of notification from the excavating operator or within a time frame agreed upon by the excavator.

- 3. Markers. The operator shall use paint, stakes, flags or other appropriate means to mark its underground facilities. The physical characteristics in the area of the proposed excavation shall be considered when determining the type of marker to be utilized. Markers shall conform to the color code established by Dig Safe, as follows:

- a. Red: electric power lines, cables, conduit, or lighting cables;
- b. Yellow: gas, oil, steam, petroleum, or gaseous materials;
- c. Orange: communication, alarm, or signal lines, cables, or
- d. Blue: water, irrigation, or slurry lines;
- e. Green: sewers or drain lines; and
- f. Purple: reclaimed water, irrigation, and slurry lines.

conduits;

- 4. Marking procedures

- a. Identification. Marking shall identify changes in direction or terminations occurring within the immediate area of the proposed excavation. Where practical, all marking methods shall indicate the width of the underground facility.

- b. Tolerance zone. The operator shall mark a finite area, designated the "tolerance zone," on each side of the underground facility. The tolerance zone for each facility will be an area 18 inches on each side of the facility for the length of the facility within the area of proposed excavation.
- c. Marking methods. The operator shall use one of the following marking methods to establish the tolerance zone of an underground facility:
 - 1) The corridor marking method. This method involves placing markers at either boundary of the tolerance zone, such that the markers will be placed away from the facility centerline 18 inches plus one-half the width of the facility. If an operator maintains two or more facilities in close proximity to each other within the excavation area, one tolerance zone may include both facilities. In this instance, the boundaries of the zone shall be established by locating the boundaries of each separate facility and placing markers 18 inches from the outer boundaries of the multiple facilities. In this circumstance, the operator shall mark the centerline of each facility within the marked boundaries.
 - 2) The centerline marking method. This method involves placing markers directly over the centerline of the facility, permitting the excavator to establish boundaries of the tolerance zone at points located 18 inches plus half the width of the facility from the markers. The width of the facility shall be indicated upon the markers. If an operator maintains two or more facilities in close proximity to each other within the excavation area, the operator shall place markers over the centerline of each facility.
 - 3) The offset marking method. This method involves locating the centerline of the facility by placing markers at locations that parallel the facility. The offset marking methods shall be used only when it is impractical to use either the corridor or centerline methods. The markers used for the offset marking methods shall indicate the distance and direction to the centerline of the facility and its width.

C. Reporting

1. Report to Commission. An operator shall report to the Commission any violations of this rule that an operator observes and that:
 - a. pose a clear threat to an underground facility; or
 - b. result in damage to an underground facility.

The violation shall be reported on the Underground Facilities Incident Report available from the Commission (207-287-3831 or <http://www.state.me.us/mpuc>). The operator shall submit this report within 10 days of discovering a suspected violation. Any person may report to the Commission any other failure to comply with this rule or other concerns regarding underground facilities damage prevention, using the Underground Facility Incident Report.

2. Annual activity report. An operator shall submit a report to the Commission within 75 days after the end of each calendar year that states the total number of excavation notifications received by the operator during the previous year and the total miles of underground facilities it operates.

3. New underground facilities. An operator shall notify the Commission immediately when installing, or when it newly identifies, underground facilities that it is obligated to mark pursuant to Section 6(B) in a municipality in which it did not previously have such underground facilities and shall indicate whether it is a member or a non-member of the Dig Safe System.

4. Non-member operator registration. Each non-member operator shall register with the Commission providing its name, the name and telephone number of a contact person for excavation notifications, and the municipalities, townships, or other civil divisions or territories in which it has underground facilities for use in the Commission's reference database. The non-member operator shall notify the Commission as soon as possible of any changes to this information and shall renew its registration annually by January 31 certifying the accuracy of the information on file with the Commission. This requirement does not apply to an entity that only owns underground facilities on its own property for commercial or residential purposes.

D. Natural Gas Operators

1. Applicability. The provisions of this subsection are applicable to gas operators. For the purposes of this subsection, a gas operator is a natural gas pipeline utility or a gas utility other than a gas utility over which the Commission has limited safety jurisdiction pursuant to 35-A M.R.S.A. § 4702.
2. Excavation notice to fire departments. In addition to providing other notices required under this rule, before commencing any excavation for the purpose of working on an underground transmission line, a gas operator shall provide notice of any excavation to the Fire Department within whose service area the excavation will occur. This notice must be in writing or by telephone and must be given at least three business days prior to excavation. Work may not commence until the operator has received from the Fire Department an acknowledgement of the notice either by telephone or in writing.
3. Emergency management information. Each gas operator shall provide maps that clearly indicate the location and depth of all main supply underground gas facilities to the following jurisdictions:
 - a. each municipality within which it operates;
 - b. each fire department within whose service territory it operates;
 - c. the county emergency management agency for each county within which it operates; and
 - d. the Maine Emergency Management Agency.

The gas operator must provide updated maps to the appropriate entities whenever changes occur to the configuration of the operator's main supply underground gas facilities.

E. Legal Effect of Non-compliance

1. Members. If an operator does not provide all information pursuant to Section 6(B) or the information provided fails to identify the location of the underground facilities in accordance with Section 6(B) or if Dig Safe does not provide all information pursuant to Section 5(A), and an excavator complies with all excavator responsibilities described in Sections 4(A) and 4(B)(1) or Subsection 4(B)(1)(a)(ii), then an excavator is not liable for any damage or injury caused by the excavation, except on proof of negligence.

2. Non-members. If an excavator provides notice to non-member operators pursuant to Section 4(B)(2), and if a non-member operator fails to mark the location of its facilities pursuant to Section 6(B), then an excavator is not liable for any damage or injury caused by the excavation, except on proof of negligence.

§ 7 COMMISSION ACTIVITIES

- A. Monitoring. The Commission may require operators, excavators, or Dig Safe to report information that the Commission determines is needed to monitor the operation of the underground facilities damage program, or to hear and resolve complaints concerning failure to comply with the provisions of 23 M.R.S.A. § 3360-A (the Dig Safe Law) or this rule.

A-1. Reference Database. The Commission shall develop and maintain a database for excavator reference listing the non-member operators that have registered with the Commission as having underground facilities and indicating those municipalities, townships or other civil divisions or territories of the State in which the underground facilities are located, and, indicating those in which member operators do not have underground facilities. The Commission will make the reference database accessible by telephone and internet or by other reasonable means. The Commission will update the reference database upon notification by an operator of the presence of underground facilities in a municipality.

- B. Enforcement Action Procedure. The Commission shall use the following process when it initiates an enforcement action:

1. Notice of probable violation
 - a. Probable violation. If the Commission finds evidence of a probable violation of the Dig Safe Law (23 M.R.S.A. § 3360-A) or this rule, it shall issue a notice of probable violation (NOPV) to the respondent. The Commission may delegate the decision concerning the issuance of a NOPV to its staff.
 - b. Content of notice. The NOPV shall state the name of the respondent, the factual basis for the alleged violation, and the amount of the administrative penalty recommended to resolve the matter.
 - c. Right to contest. The NOPV shall state that the respondent has a right to contest the allegation of probable violation by requesting, in writing within 30 days, an informal review.

- d. Default. If the respondent fails to request an informal review of the NOPV within 30 days of its receipt, the respondent shall be deemed, upon issuance of an appropriate Commission order, to have defaulted and to have committed the violations alleged. A Commission order on default shall be treated as a finding of a violation for purposes of future applications of this rule.
- e. Penalty. If the respondent is declared to have defaulted by a Commission order, the respondent shall, upon issuance of the Commission order be liable to pay the administrative penalty or take the action designated in the NOPV unless the Commission orders otherwise. The Commission may not impose a greater administrative penalty than contained in the NOPV without holding an adjudicatory hearing or obtaining the consent of the respondent. The Commission may reduce the penalty or modify any required remedial action as it determines is warranted.

2. Informal review

- a. Staff review. If a respondent contests a NOPV, a staff member designated by the Commission shall conduct an informal review. The review shall consist of an informal conference and an analysis of the respondent's written reply, if any.
- b. Date for informal conference. The informal conference shall be scheduled no less than 21 days, and no more than 60 days, from the issue date of the NOPV.
- c. Written reply. The respondent may file a written reply with the Commission on or before the day scheduled for the informal conference. The respondent or the respondent's designee must sign the written reply and shall include a statement of all relevant facts and authority and the basis for respondent's dispute of the alleged violation.
- d. Informal conference
 - 1) At the informal conference, the respondent shall have the right to be represented by an attorney or other person, to present evidence and make arguments in support of respondent's position.
 - 2) The Commission shall make available to the respondent any evidence that indicates that the

respondent may have violated these rules or
23 M.R.S.A. § 3360-A.

3. Recommended decision
 - a. Following the informal conference, the Commission staff member shall issue in writing, a recommended decision indicating whether or not the respondent has violated the Dig Safe Law or these rules and the basis for that conclusion, and the recommended disposition.
 - b. The recommended decision will be sent to the respondent by mail, return receipt requested and forwarded to the Commission.
 - c. If the recommended decision is adverse to the respondent, the respondent may request an adjudicatory hearing.
4. Adjudicatory hearing
 - a. Election. A respondent may request an adjudicatory hearing only after informal review. Such request must be made in writing within 30 days of the date of receipt of the staff's recommended decision.
 - b. Failure to request hearing. A respondent that fails to make a timely request for an adjudicatory hearing shall be liable to pay the administrative penalty or take the remedial action designated in the staff's recommended decision upon issuance of a Commission order. Unless otherwise ordered, the Commission will consider this order as a finding of a violation for purposes of future applications of this rule. The Commission may not impose a greater administrative penalty than contained in the NOPV without holding an adjudicatory hearing or obtaining the consent of the respondent. The Commission may reduce the penalty or modify any required remedial action as it determines is warranted.
 - c. Hearing. The adjudicatory hearing shall be a de novo hearing and shall be conducted in accordance with 5 M.R.S.A. §§ 9051-9064.
5. Remedial orders. After considering all of the evidence, if the Commission finds that a violation has occurred, it may issue a remedial order.

- a. Content. The remedial order shall set forth the factual and legal basis of the Commission's findings and may direct the respondent to take any action, including the payment of an administrative penalty, as authorized by this rule.
 - b. Effect. A remedial order issued by the Commission shall have the same effect as any order issued by the Commission.
- 6. Consent agreements. Notwithstanding any other provision of this rule, the Commission may at any time resolve an alleged violation with a consent agreement.
 - a. Content. A consent agreement must be signed by the respondent, or a duly authorized representative, and must indicate agreement with the terms therein.
 - b. Order. A consent agreement is effective only if approved by the Commission through the issuance of an order.
- C. Commission Action.
 - 1. In all cases in which respondent has not requested an adjudicatory hearing, the Commission will consider the evidence along with the proposed disposition (uncontested NOPV or staff's recommended decision, or consent agreement), in deliberative session, and take one of the following actions:
 - a. If the proposed disposition finds that respondent did not commit a violation, the Commission may, by order,
 - 1) accept that finding and take no further action, or
 - 2) reject that finding and notify the respondent that the matter will be scheduled for an adjudicatory hearing and decision.
 - b. If the proposed disposition finds that respondent did commit a violation and the respondent agrees to the proposed disposition, the Commission may, by order,
 - 1) Accept the finding and order an equal or lesser penalty or disposition without giving respondent further notice,

- 2) Accept the finding but not the disposition and notify the respondent that it has set the matter for adjudicatory hearing to consider a higher penalty or more burdensome disposition, or
 - 3) Reject the finding and proposed disposition and dismiss the NOPV or notify the respondent that it has set the matter for adjudicatory hearing.
2. In cases in which the Commission has held an adjudicatory hearing, the Commission will consider the evidence in deliberative session and determine whether respondent has violated the Dig Safe Law or this rule.
 - a. If the Commission finds no violation, it will dismiss the NOPV and take no further action.
 - b. If the Commission finds that respondent has committed a violation, it may impose any penalty authorized by law.

§ 8 ADMINISTRATIVE PENALTIES

- A. Approval Required
 1. The Commission must approve in a deliberative session the disposition of every alleged violation that requires payment of an administrative penalty or other remedial action.
 2. The Commission's deliberation and approval by order of the imposition of an administrative penalty or other remedial action satisfies the statutory requirement for an adjudicatory proceeding in 23 M.R.S.A. § 3360-A (6-C).
- B. Penalty Assessment. The Commission may impose an administrative penalty on an excavator or member operator that is found by the Commission in a proceeding under section 7 to have committed a violation included in Section 8(C) below.
- C. Violations. The Commission may impose an administrative penalty for any of the following violations:
 1. Excavation that does not comply with the requirements of Section 4(A), Section 4(B)(1)(a) through 4(B)(1)(d), or Section 4(C)(2), except to the extent the excavator is exempt from the provisions of these subsections;

2. Excavation done in a reckless or negligent manner that poses a threat to an underground facility;
 3. Failure of a member operator to comply with the requirements of Section 6(B)(1), 6(B)(2)(a), 6(B)(2)(b) or 6(B)(4)(b), except to the extent the member operator is exempt from the provisions of the subsection; and
 4. Marking by a member operator of the location of an underground facility in a reckless or negligent manner.
- D. Violation Conditions. Before imposing a penalty, the Commission shall consider evidence of the record of the violator, including, to the extent applicable, the number of successful excavations undertaken by the violator or the number of locations successfully marked by the violator during the prior 12 months. Administrative penalties imposed pursuant to these rules are in addition to any other remedies or forfeitures provided by law and any liability that may result from the act or omission constituting the violation.
- E. Penalty Level
1. Single violation. The administrative penalty shall not exceed \$500 if the excavator or member operator has not committed a violation pursuant to Section 8 within the 12 months prior to committing the violation that results in the penalty.
 2. Multiple violations. The administrative penalty shall not exceed \$5000 if the excavator or member operator has committed a violation within the 12 months prior to committing the violation that results in the penalty.
- F. Training Requirements. In addition to other actions taken by the Commission, the Commission may require an excavator or member operator who is found pursuant to Section 7 to have violated this rule or 23 M.R.S.A. § 3360-A to participate, at the expense of the violator, in an educational program developed and conducted by Dig Safe.

§ 9 CONTEMPT

Failure to comply with any order, decision, rule, or requirement of the Commission may be punished using its contempt authority in 35-A M.R.S.A. § 1502.

§ 10 IMPRUDENT ACTION

Compliance with this rule does not excuse a person from acting in a careful and prudent manner nor does compliance with this rule excuse a person from liability for damage or injury for failure to so act.

§11 INJUNCTIONS

Under appropriate conditions, the Commission or an operator may act under the authority of 23 M.R.S.A. § 3360-A (12) and seek a temporary restraining order or injunction to prevent a person from undertaking an excavation that may result in damage to an underground facility.

§12 WAIVER OR EXEMPTION

Upon the request of any person subject to the provisions of this Chapter or upon its own motion, the Commission may waive any of the requirements of this Chapter that are not required by the statute. Where good cause exists, the Commission, the Director of Technical Analysis, or Presiding Officer in a proceeding related to this Chapter may grant the requested waiver, provided that the granting of the waiver would not be inconsistent with the purposes of this Chapter or Title 35-A.

BASIS STATEMENT: The factual and policy basis for this rule is set forth in the Commission's Order provisionally Adopting Rule and Statement of Factual and Policy Basis, Docket No. 2003-671, issued on January 26, 2004. Copies of this Statement and Order have been filed with this rule at the Office of the Secretary of State. Copies may also be obtained from the Administrative Director, Public Utilities Commission, 242 State Street, 18 State House Station, Augusta, Maine, 04333-0018.

STATUTORY AUTHORITY: 5 M.R.S.A. § 8001 *et seq.*, 23 M.R.S.A. § 3360-A, 35-A M.R.S.A. §§ 104, 111, and 1502.

EFFECTIVE DATE: This Chapter was approved as to form and legality by the Attorney General on _____, 2004. It was filed with the Secretary of State on January 26, 2004 and became effective on February _____, 2004.